No. 10967

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM MORRIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

To the Honorable Ninth Circuit Court of Appeals of the United States of America:

This is an appeal from the District Court of the United States, Southern District of California, Central Division, of a conviction of the appellant in two counts of an information charging the defendant with violation of the Emergency Price Control Act of 1942, and certain regulations allegedly issued pursuant thereto.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 225. The appellant was informed against on the 5th day of October, 1944, charging him with four counts of violation of the Emergency Price Control Act of 1942 as amended (Pub. Law 421, 77th Congress, 2d Sess., 56 Stat. 23), and Section 1351.1405(g) of Maximum Price Regulation 292

as amended, 8 Federal Register 135 and 543, allegedly promulgated pursuant to Section 202 of the Emergency Price Control Act of 1942, and violation of Maximum Price Regulation 292 as amended.

Judgment was pronounced against the defendant on Counts I and II, on January 8, 1945, by Judge Leon R. Yankwich. Notice of appeal was duly and regularly filed January 9, 1945, pursuant to the authority of Title 28, Section 225, U. S. Codes, and to the Emergency Price Control Act of 1942, Publ. 421, 77th Congress, 2d Session, 56 Stat. 23, January 30, 1942. [R. 36, 37, 38, 39.]

Short Statement of Facts.

The appellant was informed against on October 5, 1944, by the District Attorney in a complaint verified by F. Carson Kagy, charging in Count I that the defendant violated the provisions of the Emergency Price Control Act of 1942 as amended, in that he did knowingly, willfully, and unlawfully, make a false entry in a material respect in Morris Brothers Fruit Company's copy of a statement showing the sale to Aldrich & Company of 14 South Watermarket, Chicago, Illinois, of 582 boxes of oranges for the price of $4.50 per box, whereas the actual price charged for the sale of said oranges was an average of $5.50 per box, which fact as to the price charged for said sale of said oranges was known to the defendant at the time of said entry and said entry was false at the time of making said record, and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended, 8 Federal Register 135 and 8 Federal Register 543, which was promulgated pursuant to the provisions of Section 202 of the Emergency Price Control Act of 1942 as amended.

Count II is a copy in every detail of Count I, except that the concluding language, beginning "contrary to the form of the statute" substitutes "[19]" for "[18]" as the precise subdivision of the amended Act of 1942, alleged to have been violated. Count II charged that on the same date the defendant made a false entry in a material respect in Morris Brothers Fruit Company's copy of a statement showing a sale to Aldrich & Company of 582 boxes of oranges for the sum of $4.50 per box. During the trial of the case, after the jury was sworn, Count I of the information was amended to insert the words "that maximum Price Regulation 292 as amended, which was promulgated pursuant to the provisions of Section 202 of the Emergency Price Control Act of 1942, *which regulation 292 as amended had been approved by the Secretary of Agriculture.*" (HRYJ.) The same amendment was made to Count II of the information. [R. 14, 15, 57, 58.]

William Morris and Louis Morris are copartners in the Morris Brothers Fruit Company. On October 17, Anthony Arrigo, a half partner of Aldrich & Company located in Chicago, Illinois, whose business is supplying oranges, potatoes and vegetables to hotels, restaurants and dining cars, bought a couple of cars of oranges from William Morris. [R. 69-71.] Morris gave Arrigo two statements. [Plaintiff's Ex. 2 and 3.] A young girl in the office made out the statements. Arrigo did not see whether she made any copies of the statement. The typewriting was done in a different room. [R. 71.] Arrigo said he gave Morris a cashier's check for $1,000.00 a cashier's check for $2,000.00, another cashier's check for $1,000.00 and a check for $238.00. [R. 71.] Arrigo took delivery of the one car of oranges immediately, and paid the transportation. He took delivery of the other

car at a later date and also paid the transportation on that. [R. 72.] The check for $238.00 was written by the young lady who came from another office. Arrigo made out a check for $164.00 himself, payable to cash. The oranges were shipped from the LaVerne Cooperative storage. There was some controversy regarding the oranges, and on Arrigo's complaint he received a refund in the sum of $436.50 from Morris Brothers. Arrigo sent a letter along with his claim to the Morris Brothers for a refund. In his letter he said:

> "Also you mention something about black market operations, on the remark that we said 'we paid a tremendous price on oranges.' Our remark in that letter means only that we paid the ceiling price and no more, but it is a tremendous price for such a poor quality of oranges."

Ann L. Joseph testified that she was employed by Morris Brothers Fruit Company from June 14, 1943, to July 15, 1944, in the capacity of head bookkeeper, that she had never seen Exhibits 2 and 3 before. She was asked about the practice or custom of making out invoices. [R. 67.] Over objections, the court permitted her to answer. She said she never saw either of the statements, Exhibits 2 and 3, and she had nothing to do with making them. She said: "The accounts receivable clerk made these bills and sent them out." [R. 69.]

L. L. Collum testified that he was employed by the American Fruit Growers, Inc., and has access to the rec-

ords of his company showing sales of oranges to Morris Brothers Fruit Company during the week commencing October 17, 1943, and he did not find any sales of oranges to Morris Brothers Fruit Company during that week.

F. S. Gunther of the Mutual Orange Distributors testified he did not sell any oranges to Morris Brothers Fruit Company during the week commencing October 17, 1943.

Earl S. Hans, employed by the California Fruit Growers Exchange, testified that a group of pink slips which he brought with the records of the California Fruit Growers Exchange showed sales to Morris Brothers Fruit Company during the week of October 17, 1943, and that on invoice 35642, the figures 10-18-43 represents the actual date of sale and the figures under the words "price per box" at the bottom of the page, "base price $4.08," were placed there in accordance with ceiling price regulations. Louis Morris testified: he is a brother of the defendant; both are partners in Morris Brothers Fruit Company; he never saw a duplicate of plaintiff's Exhibit No. 2; it was the custom to "make these up in duplicates"; on invoices two copies are usually made [R. 65, 66]; Exhibits 2 and 3 are not invoices. He never saw any copies or originals of them; they are entirely different from invoices. [R. 66.]

"None of the oranges represented by the statements, Government's Exhibit No. 1 was ever in storage at La Verne." [R. 91.]

The foregoing witnesses were called by the plaintiff. The following consists of testimony by defendant's witnesses. The defendant, William Morris, testified that Arrigo asked him for oranges and Morris said the oranges were at La Verne in cold storage and Arrigo could go and look at them. Defendant did not say he would require $1.25 above the ceiling. Two days later Arrigo returned, said he had seen the oranges and wanted 2 cars, and "I sold them to him for $4.50 per box." Defendant denied ever having seen the check for $164 [Pl. Ex. 9] and said "the girl got the checks" and made them out and deposited them, and Mr. Arrigo only paid defendant $4.50 per box. [R. 86, 87.]

Andrew Morris, one of the partners of the Morris Brothers Company said that 4 or 5 hours after defendant introduced Arrigo to him, Arrigo returned and said, "I got to have some money and cash a check." Andrew cashed Plaintiff's Exhibits 4 and 9 for Arrigo, and gave Arrigo the cash. Andrew indorsed the checks; "I used * * * my personal money." Our business is mostly cash. William Morris was out when the checks were cashed. Andrew knew Arrigo had bought two carloads but did not know exactly how many boxes were in those cars. [R. 88, 89.] Andrew said he did "a great deal of buying for the firm," usually in cash "and, therefore, always carry a large amount of money with me." [R. 90.]

Questions Raised by This Appeal.

1. Did the trial court err in failing to instruct the jury on the statutes and regulations of the offenses for which the defendant was being tried?

2. Did the trial court err in permitting an amendment to the verified information without the authority of the verifier, and after the trial had commenced?

3. Did the information in this case fail to state an offense against the laws of the United States, where it did not allege pursuant to the provisions of the Emergency Price Control Act of 1942, as amended, Section 3, the authority and approval of the Secretary of Agriculture?

4. Did the trial court err in failing to direct the verdict because of insufficiency of the evidence to support the judgment?

5. Did the trial court err in admitting certain copies of exhibits in evidence, for which no proper foundation had been laid?

6. Did the trial court err in its refusal to give certain instructions regarding an accomplice?

Specification of Error No. 1.

The trial court erred in failing to instruct the jury on the statutes and regulations of the offenses for which the defendant was being tried. (No assignment of error.)

Specification of Error No. 2.

The trial court permitted the amendment to the information during the trial of the case. (No assignment of error.)

Specification of Error No. 3.

The trial court erred in denying the defendant's motion to quash and set aside amended information, made by this defendant on the 27th day of November, 1944, as to Counts 1, 2, 3 and 4 of said amended information, which motion was based upon the following grounds:

That the said amended information and each count thereof fails to state facts sufficient to constitute a criminal offense; that the laws, rules and regulations upon which said amended information purports to be based are arbitrary and discriminatory, unreasonable, invalid, unconstitutional and void; that it does not appear that the United States attorney in and for the Southern District of California, Central Division, has been authorized to institute the above-entitled action by the Secretary of Agriculture or that the Secretary of Agriculture did prior to the commencement of the above proceedings at any time approve the institution of the above-entitled action. That it does not appear that the maximum price alleged is in conformity with the rules and regulations of the Secretary of Agriculture or with the provisions of the Agricultural Marketing Agreement Act of 1937, as amended.

That Counts 1 and 2 of said amended information are indefinite and uncertain in that it cannot be ascertained therefrom how or in what manner the facts therein alleged were in violation of Section 1351.1405(g) of the Maximum Price Regulation 292, as amended, or were in violation of Section 205(b) of the Emergency Price Control Act, as amended.

Specification of Error No. 4.

(Assignment of Error No. 2.)

That the court erred in overruling the demurrer of defendant to Counts 1, 2, 3 and 4 of the amended information, which demurrer was based upon the following grounds and to which ruling defendant duly excepted:

(a) That said amended information fails to state facts sufficient to constitute a criminal offense.

(b) That Count 1 of said amended information fails to state facts sufficient to constitute a criminal offense.

(c) That Count 2 of said amended information fails to state facts sufficient to constitute a criminal offense.

Specification of Error No. 5.

(Assignment of Error No. 3.)

The court erred in overruling defendant's objection to the introduction of any evidence made at the opening of Government's case, which said motion was made upon the following grounds:

> "Mr. Leake: If the court please, at this time I desire to make an objection to the introduction of any evidence on the ground that the information doesn't state the facts sufficient to constitute a cause of action. Following that up a little more in detail, it totally lacks any allegation bringing it within the provisions of the Price Control Act, particularly Section 3 of the Act requiring the prior approval of

the Secretary of Agriculture. That applies to all four counts.

The second point which I propose to raise is regarding the allegations of the false entry, and along about line 19 it says, 'and said record . . . referring to this information . . . was a document . . .'

The Court: Let me look at it. Where is it?

Mr. Leake: Line 19. After reciting 'making a false entry,' it says: 'and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended,' and so forth.

Now, the section referred to provides as follows:

'Every intermediate seller selling citrus fruits shall:

'(1) *Make and preserve for examination* by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, *records* of the same kind as he has customarily kept *relating to the prices which he charges for* each item of citrus fruits after the effective date of this regulation, and, in addition, records *showing as precisely as possible,* the basis upon which he determined maximum prices for each item.' "

(After a brief discussion of the objections, the jury was excused and the argument proceeded in the absence of the jury.)

The objections of defendant to the introduction of evidence was by the court overruled, whereupon the following proceedings were had: The defendant duly excepted to the said ruling.

Specification of Error No. 6.

(Assignment of Error No. 4.)

The court erred in allowing and admitting into evidence Government's Exhibit No. 1, being a group of invoices, the first document of which bears the number 35642 relating to the alleged sale of oranges by California Fruit Growers Exchange to Morris Brothers Fruit Company. That defendant objected to the introduction of said Exhibit No. 1 on the ground that no proper foundation had been laid for its introduction. Defendant's objections were overruled and defendant duly excepted.

The only foundation for the admission of said Exhibit No. 1 consisted of the testimony of Earl S. Hans, which was in substance as follows:

I am cashier and auditor for California Fruit Growers Exchange and have been so employed since July of 1921. I have brought with me records of the sale of oranges to Morris Brothers Fruit Company by California Fruit Growers Exchange during the week commencing October 17, 1943. These records were kept by the clerk in the ordinary course of business and as a part of the ordinary and regular records. They are kept by one of my assistants under my direction.

Specification of Error No. 7.

(Assignment of Error No. 5.)

The court erred in overruling the objection of defendant to the testimony of the witness Ann L. Josephs, a former employee of Morris Brothers Fruit Company, relative to a practice or custom of said company in making up their statements. Said testimony being as follows:

> "Question by Mr. Tolin: Did the company have a practice or custom of making these out or was just a single one made, were they made in duplicate or triplicate or what?
>
> Mr. Leake: I will object to that on the ground that it is irrelevant, incompetent and immaterial.
>
> The Court: Well, I think it is admissible. She was head bookkeeper. Go ahead.
>
> Mr. Leake: She has stated she never saw these before.
>
> The Court: It doesn't make any difference. He is asking about a similar document. Go ahead."

To which ruling defendant duly excepted.

The substance of the testimony of the witness was as follows:

Referring to Government's Exhibits 2 and 3 for identification, we made these out in duplicate only for shipment on cars. I can tell from the wording that they represent shipments on cars. When a car of fruit was sent out, we were notified from the downstairs office. They told us how many boxes of fruit would be sent at such and such a price. We made out triplicate copies of bills of lading and sent one to the customer with a statement of this kind.

Specification of Error No. 8.

(Assignment of Error No. 6.)

The court erred in overruling the objection of defendant and in admitting into evidence Government's Exhibits 2 and 3, being copies of statements produced by the witness Anthony Arrigo as follows:

> "Mr. Tolin: I offer in evidence Exhibits No. 2 and No. 3, for identification.
>
> Mr. Leake: To which we object on the grounds that Exhibits 2 and 3 are incompetent, irrelevant and immaterial.
>
> The Court: Let me see this, are those the so-called invoices or statements?
>
> Mr. Leake: Statements.
>
> Mr. Tolin: He testified he received them from the defendant.
>
> The Court: Objection overruled. They may be received in evidence, marked with the numbers that they already have."

To which ruling defendant duly excepted.

Specification of Error No. 9.

(Assignment of Error No. 7.)

The court erred and abused its discretion in denying defendant's motion for a directed verdict as to Counts 1 and 2 and for a dismissal as to Counts 1 and 2 of the amended information at the close of the Government's case based on the grounds that the evidence adduced by the Government was wholly insufficient to establish the commission of the offenses charged in each of said counts. The defendant duly excepted to the ruling of the court on said motions.

Specification of Error No. 10.
(Assignment of Error No. 8.)

The court erred and abused its discretion in denying defendant's motion for a directed verdict and for a motion to dismiss as to counts 1 and 2 of the amended information at the close of the evidence. Said motion was made and based upon the grounds that the evidence introduced was wholly insufficient to establish a commission of the offense charged in each of said counts 1 and 2.

The defendant duly excepted to the ruling of the court on said motions.

Specification of Error No. 11.
(Assignment of Error No. 9.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 3.

An accomplice is one who aids, abets, or participates in the commission of a crime and is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Specification of Error No. 12.
(Assignment of Error No. 10.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendants' Proposed Instruction No. 4.

One who buys at a price above the maximum price fixed by the Rules and Regulations of the office of Price Administrator is equally guilty with one who sells above such prices and is an accomplice in the commission of the crime which may result from such transaction.

Specification of Error No. 13.

(Assignment of Error No. 11.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant in the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 5.

You are instructed that the witness, Anthony Arrigo, is by his own testimony an accomplice of the defendant, William Morris, in this action.

Specification of Error No. 14.

(Assignment of Error No. 12.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 6.

The testimony of an accomplice, coming from a polluted source, should be received with caution and distrust and you should not place too much reliance thereon unless the same is corroborated by other reliable creditable testimony.

Specification of Error No. 15.

(Assignments of Error Nos. 14 and 15.)

Counts 1 and 2 of the amended information constitute a splitting of one offense into two offenses contrary to law.

The evidence adduced by the Government conclusively shows that the matters alleged in Counts 1 and 2 of the amended information constitute but a single offense.

ARGUMENT.

I.

The Trial Court Erred in Failing to Instruct the Jury on the Offenses for Which the Defendant Was Being Tried. (No Assignment of Error on This Ground.)

Although there was no assignment made in respect to the failure of the court properly to instruct the jury, this court has decided that it is the duty of the trial court to give proper instructions on the subject matter of the trial.

Corson v. U. S., 147 Fed. (2d) 542.

The Supreme Court of the United States has held that it is the duty of the trial court itself to give proper instructions on the only subject matter on trial.

Screws v. U. S., 89 L. Ed. 1029.

The only reference in the case to the statute under which the appellant was being tried is contained in the instructions on page 96, as follows:

> "The offense with which the defendant is charged is violation of the Price Control Act of 1942."

The only reference to the regulations involved is contained in the instructions on page 99, reading as follows:

> "The court instructs you that the regulation under which this case arose, Maximum Price Regulation 292, was promulgated by the Price Administrator on December 31, 1942, to become effective January 11, 1943, and was duly approved by the Secretary of Agriculture before its promulgation, and that all this was done pursuant to the authority granted by the

Congress of the United States in the Emergency Price Control Act of 1942, as amended.

"The regulation was duly published in Volume 8 of Federal Register, pages 135, 138, under date of January 5, 1943."

What the statute said or what the regulation said is not told to the jury, and neither the court, counsel, nor jury, could know from the instructions given upon what charge the defendant was being tried. We think that this error alone, just as in the *Corson* case (tried by the same Judge), is grounds for the reversal of the judgments in this case.

II.

The Court Erred in Overruling the Demurrer of Defendant to Counts 1 and 2 of the Amended Information Which Demurrer Was Based Upon the Following Grounds and to Which Ruling Defendant Duly Excepted:

(a) That Said Amended Information Fails to State Facts Sufficient to Constitute a Criminal Offense.

(b) That Count 1 of Said Amended Information Fails to State Facts Sufficient to Constitute a Criminal Offense.

(c) That Count 2 of Said Amended Information Fails to State Facts Sufficient to Constitute a Criminal Offense.

At the outset of the trial, after the jury was impanelled, the court permitted the amendment of the verified information, without the consent of the defendant, and without the verification of the person who swore to the in-

formation. While an information that is filed on oath of the District Attorney might be amended, where the information is based upon the oath of another it cannot be amended in the Federal Court without the consent of the person who verified the oath. To do so would be to proceed on an information different than that filed and upon which plea was entered. To proceed on such information is not to proceed in orderly fashion and according to due process of law.

Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849.

In this case, the information was filed upon the verification of F. Carson Kagy, and was in the following language:

> "State of California, County of Los Angeles, United States of America—ss.
>
> F. Carson Kagy, being first duly sworn, upon oath deposes and says:
>
> That he is an employee of the United States Government, to-wit, an investigator for the Office of Price Administration, an agency of the United States Government; that in the course of his duty as investigator for the Office of Price Administration, he made an investigation of the matters set forth and mentioned in the above and foregoing information against William Morris; that he has read the above and foregoing information and knows the contents thereof and that the matters set forth therein are true to the best of his knowledge and belief.
>
> F. Carson Kagy.

Subscribed and sworn to before me this 2d day of October, 1944.

NANCY J. VILEY,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires December 22, 1946."

During the trial, and without the consent of Mr. Kagy, the information as thus verified was amended by the addition of the words therein set out. The defendant was not re-arraigned upon the amended information and no plea was taken nor was there any formal opportunity to plead or to object thereto, and where the information is verified by an individual, to permit the amendment of the information in the middle of the trial, without the consent of the individual who verified it, is similar to a change in the verified indictment, which the court has held "deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute."

In *Ex parte Bain,* the court, in quoting from *State v. Sexton,* 3 Hawks Law and Equity, N. C. 184, said:

> "Being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found."

and so here the information, having been founded on the oath of F. Carson Kagy, could not be amended without the concurrence of the person upon whose oath the information was secured.

Specifications of Error Nos. 3 and 4.

It was essential to the jurisdiction of the court that the Secretary of Agriculture, prior to the commencement of the suit, approve the action and the maximum price regulation. These defects were jurisdictional.

Emergency Price Control Act of 1942, as amended by the Stabilization Act of 1944.

Public Law 421, 77th Congress, 2d Session, 56 Stat. 23, Jan. 30, 1942, as amended October 2, 1942; 56 Stat. 767, and as amended June 30, 1944, 58 Stat. 632.

(a) The amended information failed to allege that the Government did the things provided in the Emergency Price Control Act as amended. The information was presumably brought under the Emergency Price Control Act of 1942, 56 Stat. 23, and the power of this act had expired except for the amendments provided on July 16, 1943, 57 Stat. 566, and the amendment of June 30, 1944, 58 Stat. 632. No authority is alleged in the information for the amended information.

(b) The amended information fails to set up that the Secretary of Agriculture approved the purported regulation which it was alleged was violated or that the prices were such as authorized by the Secretary of Agriculture, or that the provision of Subdivision L of Section 902, Title 50, had been established by the Administrator for any agricultural commodity after notice as required by the statute, nor is there any statement which brings the

acts within section 3 of the Emergency Price Control Act (Section 903, Title 50).*

Specification of Error No. 5.
(Assignment of Error No. 3)

The court erred in overruling defendant's objection to the introduction of any evidence made at the opening of Government's case, which said motion was made upon the following grounds:

"Mr. Leake: If the court please, at this time I desire to make an objection to the introduction of any evidence on the ground that the information doesn't

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*Emergency Price Control Act, Title 50, Section 903:

"(a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differential, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919 to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity

state the facts sufficient to constitute a cause of action. Following that up a little more in detail, it totally lacks any allegation bringing it within the provisions of the Price Control Act, particularly Section 3 of the Act requiring the prior approval of the Secretary of Agriculture. That applies to all four counts.

The second point which I proposed to raise is regarding the allegations of the false entry, and

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a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the "Agricultural Marketing Agreement Act of 1937, as amended (Title 7, Sections 601, 602, 608a-608c, 608d, 608e, 610, 612, 614, 624, 671-674), or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act (sections 901-946 of this Appendix) by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (sections 922 and 925 of this Appendix) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

(g) Whenever a maximum price has been established, under this Act (sections 901-946 of this title) or otherwise, with respect to any fresh fruit or any fresh vegetable, the Administrator from time to time shall adjust such maximum price in order to make appropriate allowances for substantial reductions in merchantable crop yields, unusual increases in costs of production, and other factors which result from hazards occurring in connection with the production and marketing of such commodity. Jan. 30, 1942, c. 26, Title I, Section 3, 56 Stat. 27, as amended June 30, 1944, c. 325, Title I, Section 103, 58 Stat. 636."

along about line 19 it says, 'and said record . . . referring to this information . . . was a document . . .'

The Court: Let me look at it. Where is it?

Mr. Leake: Line 19. After reciting 'making a false entry,' it says: 'and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended,' and so forth.

Now, the section referred to provides as follows:

'Every intermediate seller selling citrus fruits shall:

(1) Make and preserve for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept relating to the prices which he charges for each item of citrus fruits after the effective date of this regulation, and, in addition, records showing as precisely as possible, the basis upon which he determined maximum prices for each item.' "

We reiterate this specification of error and the grounds urged, but believe it is more properly to be urged on the ground that the amended information fails to state a public offense, in that the act does not require such a document to be preserved.

Specification of Error No. 6.
(Assignment of Error No. 4.)

The court erred in allowing and admitting into evidence Government's Exhibit No. 1, being the group of invoices, the first document of which bears the number 35642 relating to the alleged sale of oranges by California Fruit Growers Exchange to Morris Brothers Fruit Company. Defendant objected to the introduction of said Exhibit No. 1 on the ground that no proper foundation had been laid for its introduction. Defendant's objections were overruled and defendant duly excepted.

The only foundation for the admission of said Exhibit No. 1 consisted of the testimony of Earl S. Hans, which was in substance as follows:

I am cashier and auditor for California Fruit Growers Exchange and have been so employed since July of 1921. I have brought with me records of the sale of oranges to Morris Brothers Fruit Company by California Fruit Growers Exchange during the week commencing October 17, 1943. These records were kept by the clerk in the ordinary course of business and as a part of the ordinary and regular records. They are kept by one of my assistants under my direction.

The lack of foundation for the introduction of these slips is so patent that their admission without proof of further foundational facts is surprising.

The Court erred in admitting Exhibit No. 1, as two things were necessary under Title 28, Section 695, to lay the foundation for the admission of this Exhibit:

1. That it was made in the regular course of business;

2. That it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

Title 28, Section 695, United States Codes.

1. Here the evidence did not show that the records were *made* in the regular course of business.

2. It did not show that it was the regular course of such business to make such invoice.

Palmer v. Hoffman, 318 U. S. 109, 87 L. Ed. 645.

The evidence in this case failed to show, first, that it was made by the California Fruit Growers Exchange, and, second, that it was the regular course of such business to make the particular type of invoice.

> "The first general requirement is that the entry must have been made in the *regular course of business.*"
>
> 5 *Wigmore, supra*, Sec. 1523.

Incident to this rule:

> "The entry offered must of course be a part of a *series* of *entries* or *reports*, not a casual, isolated one, because the trustworthiness of the entries by reason of 'powerful motives to accuracy' which result from 'systematically and habitually' recording 'a course of business dealings' which makes admissible the record

of a part of a '*series* of *entries* or *reports* is lacking in the entry of a single isolated matter."

5 *Wigmore, supra,* Secs. 1522 and 1525.)

The instant sales slips merely have to do with two sales made at the same time and constitute a single isolated transaction, and this element of the necessary foundation was not proved, and probably could not have been.

Specification of Error No. 7.

(Assignment of Error No. 5.)

The court erred in overruling the objection of defendant to the testimony of the witness Ann L. Josephs, a former employee of Morris Brothers Fruit Company, relative to a practice or custom of said company in making up their statements. Said testimony being as follows:

"Q. (By Mr. Tobin): Did the company have a practice or custom of making these out or was just a single one made, were they made in duplicate or triplicate or what?

Mr. Leake: I will object to that on the ground that it is irrelevant, incompetent and immaterial.

The Court: Well, I think it is admissible. She was head bookkeeper. Go ahead.

Mr. Leake: She has stated she never saw these before.

The Court: It doesn't make any difference. He is asking about a similar document. Go ahead."

To which ruling defendant duly excepted.

The substance of the testimony of the witness was as follows:

Referring to Government's Exhibits 2 and 3 for identification we made these out in duplicate only for shipment on cars. I can tell from the wording that they represent shipments on cars. When a car of fruit was sent out, we were notified from the downstairs office. They told us how many boxes of fruit would be sent at such and such a price. We made out triplicate copies of bills of lading and sent one to the customer with a statement of this kind.

She further testified concerning the custom of the office as to the disposition customarily made of the copies of bills of lading that the "first one was kept by the railroad, but the other was sent to the customer with the statement attached." [R. 68.]

On cross-examination the witness testified:

> "I never saw either one of the statements, Exhibits 2 and 3 for identification. I did not make them out. The accounts receivable clerk made these bills and sent them out. I had nothing to do with making the bills out. I do not know how many copies were made of these particular bills, Exhibits 2 and 3 for identification." [R. 70.]

The gist and principal element in the charge set forth in Count 1 is the averment that William Morris "did knowingly * * * make an entry false in a material respect in Morris Bros. Fruit Co.'s copy of a statement."

The mere fact that a false entry appears in a copy of a statement received by Aldrich & Company is no evidence that an original of said copy was made and kept by Morris Brothers Company.

It is true that these Exhibits appear to be carbon copies.

However, that fact is shorn of all significance to permit an inference that Morris Brothers retained possession of the original because Miss Joseph testified that "the first one was kept by the railroad" and the second went to the customer. [R. 68.]

Hence the sole and single item of evidence, or rather, of testimony, in the record, which necessarily was the basis of the jury's implied finding that Morris Brothers ever had documents such as Government's Exhibits 2 and 3 is the head bookkeeper's statement as to what was customarily done.

Such evidence is generally held to be inadmissible as proof of a particular act even in civil cases. Evidence of *general custom and usage* in a particular business or trade is admissible in certain types of cases upon the issues of negligence and contributory negligence. However, "In any event, evidence of custom, in order to be admissible, must refer to a general custom rather than to the custom of the person whose negligence is charged."

> 38 *Am. Jur.*, p. 1016 and cases there cited.
>
> *Green v. Shaw,* 136 S. C. 56, 134 S. E. 226, 48 A. L. R. 243 (1926).

The opinion quotes many decisions and other standard authorities in support of its decision, among which is "22 Am. & Eng. Enc. Law, 2nd Ed., 809."

Again it is said in *American Jurisprudence* (Vol. 20, p. 310):

> "According to the weight of authority, however, evidence of the general habits of a person is not ad-

missible for the purpose of showing his conduct upon a specific occasion."

In the instant case it is alleged by the Government's accusation that Morris Brothers had a certain document and record which it was required to keep by a certain Price Regulation, and that the defendant made a false entry in said document.

The sole purpose of the testimony as to habit and custom was to create an inference that Morris Brothers had copies of Government's Exhibits 2 and 3 without which proof there could have been no falsification of such documents by the defendant.

Hence Ann Joseph's testimony as to the custom and practice in the office where she was bookkeeper was properly challenged by the objection that it was incompetent, irrelevant and immaterial and the court's error in admitting the evidence was highly prejudicial.

Testimony as to the habits and character of a grantor are irrelevant and inadmissible as tending to show the probability that he had transferred land in dispute in support or a recital in a deed that such transfer had been made. (*Turnalty v. Temple*, 99 C. C. A. 375, 176 Fed. 67.)

The appellate court said, "The evidence was remote and conjectural," and it quotes *First Nat. Bk. v. Stewart*, 114 U. S. 224, 29 L. Ed. 101, as follows:

> "The law requires an open and visible connection between the principal and the evidentiary facts, and the deductions from them, and does not permit a decision to be made on remote inferences."

In the *Stewart* case the evidence which was held to have been improperly received was proof that the owner of the stock, which the bank claimed was transferred to it to apply on Stewart's obligations, was and for some time had been insolvent, and the purpose of the evidence was to corroborate the testimony of bank officers as against evidence tending to show that the stock had been deposited for safekeeping only.

In *Thompson v. Bowie*, 4 Wall. 463, 18 L. Ed. 423, evidence was permitted admission to show that the maker of a promissory note was intoxicated when he made it and that he habitually gambled when intoxicated. The purpose was to support the claim that the note was given for a gambling debt.

The reasoning as well as the rule established in the *Thompson* case is applicable herein. The court said:

> "There was no direct evidence offered on the trial to impeach the consideration of the notes; but what is called circumstantial evidence, in contradistinction to direct evidence, was relied on to prove the defense. Robert Bowie, a brother of the defendant, was called by him, and allowed to testify that whenever his brother was under the influence of liquor, he had a propensity to gamble, and it is contended, as he was drunk on the morning the notes were given, and as they were in the handwriting of a professional gambler, and payable to the keeper of a gaming house, the inference is fair and reasonable that they were given for money won at play.
>
> "Did the court err in admitting this evidence?
>
> "If it did err in this matter, then the judgment must be reversed, for, undoubtedly, the jury, in the formation of their verdict, must have been greatly

influenced by testimony that the general character or habit of Thomas F. Bowie was to gamble when intoxicated.

"All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Thomas F. Bowie to gamble, when drunk, legally tend to prove that he did gamble on the day the notes were executed? The general character and habits of Bowie were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. * * *

'* * * He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth. When trying a prisoner on an indictment, for a particular crime, proof that he has a general disposition to commit the crime is never permitted. Phil. Ev. 143; State v. Field, 14 Me. 249. If a man charged with the larceny of a horse was proved—in connection with other evidence tending to show his guilt—to be drunk on the day the horse was stolen, would any court allow the general evidence to go to the jury, that when drunk he always stole a horse? And yet, the general rules of evidence are the same in civil as in criminal cases. 'There is no difference,' says Abbott, Justice, 'as to the rules of evidence between criminal and civil cases; what may be received in the one may be received in the other, and what is rejected in the one ought to be rejected in the other.' Rex v. Watson, 2 Stark. 155; Regina v. Murphy, 8 Carr. & P. 306.

"The uniform habit of a party to loan money at usurious interest, was not considered by the Supreme Court of New York a legal foundation for a verdict establishing usury, although one usurious loan had been proved between the parties to the suit, and it was altogether probable that the case under review was of that description. Jackson v. Smith, 7 Cow. 719. The uniform habit of Bowie, when drunk, to gamble, is not a legal foundation for this verdict, although it is highly probable that the notes in controversy were executed by him for a gaming consideration."

In the following cases evidence of habit was held inadmissible and incompetent:

In *Starr v. Los Angeles R. Co.*, 187 Cal. 270, 201 Pac. 599, testimony that the conductor was in the habit of talking with passengers was rejected as tending to show that he did so in the instant case.

Federal Asbestos Co. v. Zimmerman, 171 Wis. 594, 177 N. W. 881 (1920).

This decision as to the facts, resembles the instant case. Witnesses testified and described plaintiff's office custom and system in the matter of producing and mailing letters, and a copy of a certain letter was produced. The plaintiff had merely testified that he dictated the letter, but could not say that it was mailed according to the system. The opinion said that this evidence failed to show that the custom "had been followed" in "this particular instance."

There are two important distinctions to be noted which differentiates the instant testimony from that in certain cases where evidence of habit has been held admissible.

> "Although it is sufficient to prove that an addressee of a letter has received it, if it be shown that the mail matter was properly prepared and placed in the appropriate receptacle, this presumption being based upon the systematic operation of the Government's postal service, the habit or custom of an individual delivering such mail matter under certain conditions must be testified to by the person who does the mailing."

Gardam & Son v. Batterson, 198 N. Y. 175, 91 N. E. 371 (1910);

Cross & Co. v. Bell O. & G. Co., 129 Okla 188, 263 Pac. 1105 (1928);

Brailford v. Williams, 15 Md. 150, 159 (1859);

Birmingham News Co. v. Hoseley, 225 Ala. 45, 141 So. 689 (1932);

Pampanga Sugar Mills v. Chong Tiadpo, 49 P. I. 1003 (1926).

It seems obvious that the rule upheld in these and other similar cases is sound because the mere proof that a business concern has a plan and system which includes mailing letters when placed on someone's desk (*Gardam* and *Brailford* cases), or upon some other contingency, greatly reduces the probability of the system having functioned in a particular transaction and renders that probability too vague and remote to take the place of evidence, primary or secondary, that the act in question was performed, since the court cannot take judicial notice that a private system functions in every detail.

In the instant case the head bookkeeper testified that she never prepared invoices or bills of lading in triplicate or filed a copy in the records of Morris Brothers. The employee whose duties involved these functions, if they were performed, did not appear and testify that she habitually carried out the plan as the head bookkeeper outlined it.

Specification of Error No. 8.
(Assignment of Error 6)

The court erred in overruling the objection of defendant and in admitting into evidence Government's Exhibits 2 and 3, being copies of statements produced by the witness Anthony Arrigo as follows:

> "Mr. Tolin: I offer in evidence Exhibits No. 2 and No. 3, for identification.
>
> Mr. Leake: To which we object on the grounds that Exhibits 2 and 3 are incompetent, irrelevant and immaterial.
>
> The Court: Let me see this, are those the so-called invoices or statements?
>
> Mr. Leake: Statements.
>
> Mr. Tobin: He testified he received them from the defendant.
>
> The Court: Objection overruled. They may be received in evidence, marked with the numbers that they already have."

To which ruling defendant duly excepted.

Without some evidence tending to show that Morris Brothers Company had a copy or the original of the copy produced by Arrigo, the fact, if it were properly proved

that Arrigo's concern received such document would be irrelevant and immaterial, because the charge is that the defendant falsified a document which was kept by the Morris Brothers Company.

It has been shown that no competent evidence to show that such document was, in fact kept by that company.

Government's Exhibits 2 and 3 were equally irrelevant and immaterial and meaningless as circumstantial evidence to prove the essential ultimate fact Morris Brothers Company had made or retained the original or copies precisely same as these exhibits, because Ann Joseph's testimony which is the only foundation for Arrigo's, was that the original bill of lading and statement was delivered to the Railroad Company. Hence Exhibits 2 and 3 may have been the only copies that were made of the respective originals to be delivered to the Railroad.

Specifications of Error Nos. 9 and 10.

(Assignments of Error Nos. 7 and 8.)

The court erred and abused its discretion in denying defendant's motion for a directed verdict as to Counts 1 and 2 and for a dismissal as to Counts 1 and 2 of the amended information at the close of the Government's case based on the grounds that the evidence adduced by the Government was wholly insufficient to establish the commission of the offenses charged in each of said counts. The defendant duly excepted to the ruling of the court on said motions.

The court erred and abused its discretion in denying defendant's motion for a directed verdict and for a motion to dismiss as to counts 1 and 2 of the amended

information at the close of the evidence. Said motion was made and based upon the grounds that the evidence introduced was wholly insufficient to establish a commission of the offense charged in each of said counts 1 and 2. The defendant duly excepted to the ruling of the court on said motions.

The Government's Evidence Is Wholly Insufficient to Prove the Offense Attempted to Be Charged in Count I.

(a)

The District Court erred in permitting the amendment to the information and in instructing the jury that the regulation had been approved by the Secertary of Agriculture. There was no evidence in the record that the Secretary of Agriculture approved of the regulation or the price schedule. [R. 13, 14; Instruction, R. 99.]*

(b)

The statute and regulations pursuant thereto did not make the keeping of false or inaccurate records a penal offense. (*U. S. v. Eaton,* 144 U. S.; *U. S. v. Grimand,* 220 U. S.)

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*The court instructed the jury as follows:

"The court instructs you that the regulation under which this case arose, Maximum Price Regulation 292, was promulgated by the Price Administrator on December 31, 1942, to become effective January 11, 1943, and was duly approved by the Secretary of Agriculture before its promulgation and that all this was done pursuant to the authority granted by the Congress of the United States in the Emergency Price Control Act of 1942, as amended." [R. 99.]

(c)

The evidence in this case totally failed to show that there had been any violation of the Emergency Price Control Act of 1942 or any regulation issued pursuant thereto. There is nothing in the regulations that required the keeping or making of any invoices or making an offense out of the failure to keep correct invoices. While a statute may provide the law and regulations may be issued pursuant thereto, a crime cannot be created by administrative decree, and there is nothing in the evidence that shows any violation of any statute of the United States. For this reason, the verdict should have been directed.

The issue as to the insufficiency of the evidence was presented in several ways during the trial.

For the present purpose the error of the Court in refusing to direct a verdict, for the defendant [R. 75], will be discussed.

The evidence is insufficient in the following respects:

1. There is no competent evidence to show that Morris Brothers ever had any statement of the sale to Aldrich & Company.
2. The evidence fails to show that, if Morris Brothers had such a statement the same was in words and figures identical with that received by Mr. Arrigo on behalf of Aldrich & Company.
3. No competent evidence was adduced to prove that William Morris prepared or directed the preparation of Aldrich & Company's invoice or personally knew its contents.

1. The only evidence concerning the alleged "statement" in Morris Brothers "copy" of "the sale to Aldrich

& Company" as set forth in Count I, is the testimony of Anthony Arrigo and Ann L. Joseph.

Neither of these witnesses claimed to have ever seen the alleged copy of any statement of this sale in the possession of William Morris or of Morris Brothers or at all.

The conclusion of the jury that such a copy ever existed is, therefore, a mere conjecture and guess.

Arrigo testified that on October 15th, 1943, he talked with William Morris about buying oranges [R. 70]; that he then went away and returned and ordered two cars of the fruit. [R. 70.]

After identifying, that is, saying, "I recognize Government's Exhibits 2 and 3," Arrigo said,

> "A young girl in the office made out the statements. I did not see whether or not she made any copies of the statements. The typewriting was done in a different room." [R. 71.]

Arrigo reiterated the same testimony on cross-examination. [R. 73.]

Ann Joseph said she was employed by Morris Brothers as head bookkeeper, and had never seen Government's Exhibits 2 and 3 before. [R. 67.]

Over defense counsel's objections that the evidence "is irrelevant, incompetent and immaterial" the witness testified that the company had a custom of making out "triplicate copies of bills of lading and sent one to the customer with a statement of this kind attached. Not the first one, I mean the first one was kept by the railroad, but the other was sent to the customer with the statement attached. We kept the other with a duplicate statement

attached so that when it was paid we would mark that copy paid and put it back in the file so that we kept a permanent record of all these things. The company kept files of the bills of lading. [R. 68.]

On cross-examination Ann Joseph testified:

"By Mr. Leake:

I never saw either one of the statements, Exhibits 2 and 3 for identification. I did not make them out. The accounts receivable clerk made these bills and sent them out. I had nothing to do with making the bills out. I do not know how many copies were made of these particular bills, Exhibits 2 and 3 for identification.

Redirect Examination

By Mr. Tolin:

I know we did some big buying during October, 1943, from California Fruit Growers and Mutual Orange Distributors. I don't know whether we bought anything in that particular week, I wouldn't remember that. I only know we dealt with those concerns.

Recross-Examination

By Mr. Leake:

I know that Morris Brothers dealt with a great many smaller firms. I do not know how many."

The gist and principal element in the charge set forth in Count I is the averment that William Morris

"did knowingly * * * make an entry false in a material respect in Morris Bros. Fruit Co 's copy of a statement."

The mere fact that a false entry appears in a copy of a statement received by Aldrich & Company is no evidence that an original of said copy was made and kept by Morris Brothers Company.

As has been shown the sole and single item of evidence in the record, which necessarily was the basis of the jury's implied finding that Morris Brothers ever had documents such as Government's Exhibits 2 and 3 is the head bookkeeper's statement as to what was customarily done.

Under the preceding Specification of Error No. VII it has been shown that, as a matter of law the evidence of habit and custom admitted in this case was entirely inadmissible.

In addition to the authorities there set forth, others of the same import appear to foreclose the possibility of the use of habit and custom evidence to establish a particular act or fact having occurred or existed.

In *Green v. Shaw,* 136 S. C. 56, 134 S. E. 226, 48 A. L. R. 243 (1926), Dr Shaw was sued for damages and charged with wilful negligence in administering an X-ray.

Two other physicians were permitted to testify as to the defendant's habits, skill and care in administering X-ray. The verdict was for the defendant. On appeal a reversal was ordered, it being held that the admission of such testimony was erroneous, and so prejudicial as to require a new trial.

The opinion quotes many decisions and other standard authorities in support of its decision, among which is "22 Am. & Eng. Enc. Law, 2nd ed. 809," as follows:

> "The general reputation of a physician for competency and skill is inadmissible in an action for mal-

practice, because the issue is his conduct in a particular case."

It is said in American Jurisprudence (Vol. 20, p. 310):

"According to the weight of authority, however, evidence of the general habits of a person is not admissible for the purpose of showing his conduct upon a specific occasion."

The issue in the instant case is specific and narrow. It is alleged by the Government's accusation that Morris Brothers had a certain document and record which it was required to keep by a certain Price Regulation, and that the defendant wilfully, etc., made a false entry in said record and document.

The purpose of the testimony as to habit and custom was to establish as a fact that Morris Brothers had the particular records—to show the existence of the documents, without which proof, of course, there could have been no falsification.

It is believed that no precedent which is not distinguishable can be found for the admission of evidence of habit or custom, *especially as the sole evidence,* of such a specific act or fact.

In a contempt proceeding for shadowing jurors proffered testimony to show that officers of the Department of Justice habitually engaged in this practice was held to have been properly refused, as irrelevant. (*Sinclair v. U. S.,* 279 U. S. 749, 723 L. ed. 938 (1929).)

Divine v. American Express Co., 91 Vt. 521, 101 Atl. 209 (1917).

The action was for damages for loss of goods. The alleged habit was to never receive goods without giving a receipt.

> *Hartsell v. Masterson,* 132 Ala. 275, 31 So. 618 (1902).

The issue was whether the defendant had employed the plaintiff by the year or by the month. It was held that defendant's custom to employ by the year was irrelevant.

> *Missouri Cattle Loan Co. v. Great Southern L. Ins. Co.,* 330 Mo. 968, 52 S. W. (2d) 1.

The habit of always sending notice of nonpayment of premiums to show particular nonpayments.

> *Dowagiac M. Co. v. Watson,* 90 Minn. 100, 95 N. W. 884.

The custom of plaintiff to send notices to endorsers to show that a particular notice was sent. And in *Mulville v. Ins. Co.*, 19 Mont. 95, 47 Pac. 651, similar evidence was offered of a habit of jumping on trains while they were moving.

The proffered evidence was held too remote and inadmissible to prove the particular acts involved in each of these cases.

In *Holcomb v. Watson Supply Co.,* 171 S. C. 110, 171 S. E. 604, a habit of walking in the middle of the road was attempted to be proved but held inadmissible to show that the deceased had done so when struck by the defendant's truck.

In *Baltimore & O. R. Co. v. Henthorne,* 73 Fed. 634, evidence of intemperate habit was excluded as proof that defendant was drunk on the occasion in question.

To the same effect are:

Edwards v. Worcester, 172 Mass. 104, 51 N. E. 447;

Com v. Rivet, 205 Mass. 464, 91 N. E. 877;

Warner v. R. Co., 44 N. Y. 465;

Cleghorn v. R. Co., 36 N. Y. 44;

Chesapeake & O. R. Co. v. Riddle, 24 Ky. L. Rep. 1687, 72 S. W. 22;

Kingston v. R. Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230.

In *Baker v. Irish,* 172 Pa. 528, 33 Atl. 558, the defendant attempted to prove that the plaintiff had a habit of jumping out of an elevator before it stopped.

In *Federal Asbestos Co. v. Zimmerman,* 171 Wis. 594, 177 N. W. 881 (1920), witnesses testified and described plaintiffs' office custom and system in the matter of producing and mailing letters, and a copy of a certain letter was produced. The plaintiff had testified that he dictated the letter. The opinion said that the evidence failed to show that the custom "had been followed" in "this particular instance."

In the instant case the evidence fails to show that the custom was followed, and appellant contends that without some evidence to establish that fact there was a total failure of proof to show that Morris Brothers Fruit Company ever had a copy of said statement which could have been falsified as charged or at all.

As held in *First National Bank v. Stewart,* 114 U. S. 224, 29 L. ed. 101, the law requires "an open and visible connection between the principle and evidentiary fact";

otherwise no reasonable deduction is possible and if one is attempted to be drawn it must be a mere conjecture.

The reasoning in that decision and in *Thompson v. Bowie*, 4 Wall. 463, 18 L. ed. 423, previously quoted herein, and the authority of these cases, alone, should suffice to exclude the testimony of the head bookkeeper of Morris Brothers Company as to the practice in making copies of bills of lading, but who admitted that she knew nothing whatever about any copies in the instant transaction, and also, she did not know when the alleged practice began. [R. 68.]

Specifications of Error 11, 12, 13 and 14 will be considered together. They are as follows:

Specification of Error No. 11.

(Assignment of Error No. 9.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 3.

An accomplice is one who aids, abets, or participates in the commission of a crime and is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Specification of Error No. 12.
(Assignment of Error No. 10.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 4.

One who buys at a price above the maximum price fixed by the Rules and Regulations of the Office of Price Administrator is equally guilty with one who sells above such prices and is an accomplice in the commission of the crime which may result from such transaction.

Specification of Error No. 13.
(Assignment of Error No. 11.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant in the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 5.

You are instructed that the witness, Anthony Arrigo, is by his own testimony an accomplice of the defendant, William Morris, in this action.

Specification of Error No. 14.
(Assignment of Error No. 12.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 6.

The testimony of an accomplice, coming from a polluted source, should be received with caution and distrust and you should not place too much reliance thereon unless the same is corroborated by other reliable creditable testimony.

These instructions all involve the same legal questions and principles.

The trial judge refused to give each and all of the instructions concerning accomplices and their testimony.

Since the buyer and seller are in pari delicto. (Bowles v. Glick Bros. Lumber Co., 146 F. (2d) 566.) If the buyer aids, abets, advises or encourages in the transaction, the making of an invoice of which is an essential part he is an accomplice and the accused is entitled to an instruction thereon. (Peo. v. Warren, 16 Cal. (2d) 103.)

(*People v. Coffey*, 161 Cal. 433; *State v. Light*, 17 Ore. 398, 21 Pac. 132.) This is the law in Oregon (*State v. Brown*, 113 Ore. 149, 231 Pac. 926); also, in Nevada (*State v. Douglas*, 26 Nev. 196, 99 Am. St. Rep. 688), in Montana (*State v. McCarthy*, 36 Mont. 226, 92 Pac. 521), in Idaho (*State v. Gillum*, 39 Idaho 457), and in Arizona (Ariz. P. C. Sec. 1051).)

The Supreme Court of the United States said:

> "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them."

It was so declared in *Holmgren v. United States,* 217 U. S. 509, 54 L. ed. 861, and the Court implied that if any proper request for such an instruction had been requested the error might have been held to be cause for reversal in that case.

Again in *Berger v. United States* in reversing the conviction the accused, principally on the ground of misconduct of the prosecutor, the high court characterized the Government's case as "weak—depending, as it did upon the testimony of Katz, an accomplice with a long criminal record." Surely, no Court can say, without self-stultification, that an accomplice's testimony is entitled to full credit, and in fairness to the accused should be received without caution. To do so is for the Court to make itself blind to a fact which everyone else, in Court and outside of court knows.

In *Dahly v. United States,* 50 F. (2d) 37, a reversal of the conviction of Dahly and another was adjudged. It was said that whether credence should be given the testimony of Smith, an accomplice, upon which the Prosecutor chiefly relied was "open to grave doubt," and the final reason given was, "his veracity as a witness was completely destroyed by *his own testimony* and by the *admission of his counsel.*" (Emphasis added.)

Smith's testimony, among other matters, showed that he was an accomplice, which was admitted by the prosecutor.

McGinnis v. United States and Sykes v. United States.

In *McGinnis v. United States,* 256 Fed. 621, and in *Sykes v. United States,* 204 Fed. 909, it was held that where a conviction is sought on the uncorroborated testimony of an accomplice such testimony is not entitled to full credit.

In the *Sykes* case it was held that other evidence than that of an accomplice identifying and connecting the accused with the crime as one of its perpetrators is essential to constitute such a corroboration of the accomplice as renders it safe or prudent to convict, citing *State v. Chyo Chiagk,* 90 Mo. 415: *United States v. Ybanez* (cc), 53 Fed. 536; *Commonwealth v. Hayes,* 140 Mass. 366; *Commonwealth v. Holmes,* 127 Mass. 424, 34 Am. Rep. 391 and *McNeally v. State,* 5 Wyo. 59.

Wherefore appellant prays for reversal of the judgments.

Respectfully submitted,

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